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Supreme Court, U.S.
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Docket No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

STATE OF WISCONSIN,

Respondent,

-vs-

JAY D. KRAJEWSKI,

Petitioner.

On Writ of *Certiorari* to the
Supreme Court for the State of Wisconsin

PETITION FOR WRIT OF *CERTIORARI* AND APPENDIX

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74 pp

QUESTION PRESENTED FOR REVIEW

WHETHER THE WISCONSIN SUPREME COURT CIRCUMVENTED THIS COURT'S HOLDING IN *RICHARDS v. WISCONSIN*, 520 U.S. 385 (1997), AND CREATED A "DRUNK DRIVING" EXCEPTION TO THE FOURTH AMENDMENT BY PERMITTING IN DRUNK DRIVING CASES THE FORCIBLE WITHDRAWAL OF BLOOD SAMPLES FROM SUSPECTS WHO ARE OTHERWISE WILLING TO SUBMIT TO AN ALTERNATIVE CHEMICAL TEST OF THE SAME EVIDENTIARY VALUE AS A BLOOD TEST?

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CITATION OF OPINIONS AND ORDERS ENTERED

Wisconsin Supreme Court Decision:

State v. Krajewski, 2002 WI 97, 648 N.W.2d 385. (See Appendix A.)

Wisconsin Court of Appeals Decision:

State v. Krajewski, Appellate Case No. 99-3165-CR (unpubl. order)(Dated December 5, 2000). (See Appendix B.)

Trial Court Order:

State v. Krajewski, Case No. 99-CF-158 (Entered October 26,1999). (See Appendix C.)

STATEMENT OF JURISDICTION

The decision from which the petitioner seeks review was released by the Wisconsin Supreme Court on July 10, 2002. There have been no rehearings or extensions of time to file this petition.

The petitioner believes this Court's jurisdiction to review the decision in question on a Writ of *Certiorari* is conferred by 28 U.S.C. § 1257(a).

This Petition draws into question the constitutionality of the State's practice of forcibly withdrawing blood samples from suspected drunk drivers. This question, however, does not concern the application or interpretation of a particular state statute because authority for the forced withdrawal emanates from the Wisconsin Supreme Court's common law interpretation of the exigent circumstances exception to the fourth amendment. Accordingly, it appears that 28 U.S.C. § 2403(b) does not apply to the question raised herein. Nevertheless, given that the Wisconsin Attorney General's Office represented the State in the Wisconsin Supreme Court in this matter, the Petitioner will be serving three copies of this Writ upon the Attorney General for the State of Wisconsin.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

Fourth Amendment to the United States Constitution:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Wisconsin Statute § 346.63(1)(a)-(b):

Operating under the influence of intoxicant or other drug. (1) No person may drive or operate a motor vehicle while:

(a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving; or

(b) The person has a prohibited alcohol concentration.

Wisconsin Statute § 346.65(2)(a) & (b): (2) Any person violating s. 346.63(1):

(a) Shall forfeit not less than $150 nor more than $300, except as provided in pars. (b) to (f).

(b) Except as provided in par. (f), shall be fined not less than $350 nor more than $1,100 and imprisoned for not less than 5 days nor more than 6 months if the number of convictions under ss. 940.09(1) and 940.25 in the person's lifetime, plus the total number of suspensions, revocations and other convictions counted under s. 343.307(1) within a 10-year period, equals 2, except that suspensions, revocations or convictions arising out of the same incident or occurrence shall be counted as one.

STATEMENT OF THE CASE

The Petitioner, Jay D. Krajewski, was charged in Jefferson County Circuit Court with Operating a Motor Vehicle While Intoxicated-Fifth Offense, contrary to Wis. Stat. § 346.63(1)(a), and Operating a Motor Vehicle With a Prohibited Alcohol Concentration-Fifth Offense, contrary to Wis. Stat. § 346.63(1)(b). Mr. Krajewski plead not guilty to both charges.

Mr. Krajewski filed several pre-trial motions which were heard on July 27, and August 10, 1999, before the Circuit Court for Jefferson County, the Honorable Jacqueline R. Erwin presiding. (R18.) Among these motions was a motion challenging the constitutionality of the forcible withdrawal of blood from Mr. Krajewski's under the auspices of the exigent circumstances exception to the fourth amendment. More specifically, Mr. Krajewski's motion averred that an exigency ceased to exist when Mr. Krajewski indicate a willingness to submit to an alternative form of chemical testing of equal evidentiary value to the blood test. (*Id.*.) The court granted this latter motion, and suppressed the blood test result obtained by the State. (R33 & R34;

Appendix C.) On April 17, 2000, the State appealed from the circuit court's suppression order as is its procedural right under Wis. Stat. § 974.05(1)(d)2..

On appeal, the Wisconsin Court of Appeals summarily reversed the decision of the lower court based upon its earlier holding in *State v. Thorstad*, 2000 WI App. 199, 238 N.W.2d 666. Thereafter, Mr. Krajewski petitioned the Wisconsin Supreme Court for review.

On May 8, 2001, the Wisconsin Supreme Court accepted Mr. Krajewski's petition for review, and ordered briefs and oral argument. On July 10, 2002, after briefing and oral argument, the Wisconsin Supreme Court issued a five-person majority opinion affirming the order of the court of appeals. *State v. Krajewski*, 2002 WI 97, 519 N.W.2d 33.

It is from that adverse decision of the Wisconsin Supreme Court that Mr. Krajewski now seeks review in this Court.

STATEMENT OF THE FACTS

On May 20, 1999, the Petitioner, Jay D. Krajewski, was charged in a criminal information with felony operating a motor vehicle while intoxicated (OWI), contrary to Wis. Stat. § 346.63(1)(a), and one count of felony operating with a prohibited alcohol concentration (PAC), contrary to Wis. Stat. § 346.63(1)(b).

Following a preliminary hearing on May 20, 1999, at which Mr. Krajewski was bound over for trial, Mr. Krajewski filed a motion to suppress the blood test results obtained from him on the ground that his agreement to submit to a breath test caused the exigent circumstances which otherwise would have justified a forcible withdrawal of blood from him to dissipate, and thereby, any forcible withdrawal would no longer be reasonable under the fourth amendment. (R18.) A suppression hearing was held on July 27 and August 10, 1999, and following briefing, the circuit court entered a written decision and order granting the defendant's motion to suppress (R33; R34; Appendix C at C4-C12).

In its written order, the circuit court made the following findings of fact. After Mr. Krajewski was arrested, he was brought to Countryside Home, a nursing home authorized to conduct blood draws, where he was read Wisconsin's implied consent warnings and asked to submit to a blood test. (R33:5-7.) Mr. Krajewski stated that he was afraid of needles and requested a breath test rather than a blood test. (R33:5-6.) The court found that Mr. Krajewski "submitted to the test under protest because officers told him the blood would be withdrawn with or without his cooperation." (R33:5.) Ultimately, Judge Erwin concluded that Mr. Krajewski's fourth amendment rights had been violated by the forcible withdrawal because of his willingness to otherwise cooperate by providing the state with a breath sample.

The State urged the court to reject Mr. Krajewski's position on several grounds. For example, the court rejected the state's argument that a blood test was more timely available than the alternate Krajewski requested, concluding

that if Mr. Krajewski's request for a different test had been honored when made at the Countryside Home, the breath test would be at least as timely as the blood test which was subsequently conducted at Fort Atkinson Memorial Hospital. (R 33:6-7.) The court further concluded that the state did not offer any evidentiary support for its position that triers of fact accept blood test results more readily than breath or urine analysis. (R33:7.)

The court concluded that "where, as here, an equally valid test is available with the defendant's consent, the exigent circumstance exception became unavailable." (R33:7.) The court held that "[w]hen consent to a less intrusive seizure meets a coerced or forcible seizure, the latter method is unreasonable." (*Id).*

ARGUMENT

I. THE WISCONSIN SUPREME COURT HAS CIRCUMVENTED THIS COURT'S HOLDING IN *RICHARDS v. WISCONSIN*, 520 U.S. 385 (1997), AND CREATED A *PER SE* "DRUNK DRIVING" EXCEPTION TO THE FOURTH AMENDMENT.

A. Introduction.

This Court must accept jurisdiction over Mr. Krajewski's case if it has any hope of teaching a renegade lower court to be obedient to its precedent instead of circumventing that precedent by simply ignoring it. As bold as this allegation sounds, when reviewing the decision of the Wisconsin Supreme Court in *State v. Krajewski*, 2002 WI 97,

519 N.W.2d 33, this Court will appreciate that the bravado of the foregoing statement is appropriate because the Wisconsin Supreme Court simply used *Krajewski* as the vehicle to dispose of the warrant requirement in drunk driving cases, contrary to this Court's holding in *Richards v. Wisconsin*, 520 U.S. 385 (1997).

In *Richards*, this Court sent an unmistakably explicit message to the Wisconsin Supreme Court that it was not to create *per se* exceptions to the fourth amendment's warrant requirement for the sole purpose of making the law enforcement officer's job more expedient. Despite the unambiguous message delivered in *Richards*, the Wisconsin Supreme Court utterly disregarded the *Richards* admonishment and carved out another *per se* exception to the warrant requirement—this time in drunk driving cases as opposed to drug cases.

The problem in this case is succinctly and accurately described by the dissenting justices in *Krajewski* as follows:

> The majority sets forth a *blanket rule* employing the exigent circumstances exception allowing forced blood draws in OWI cases. Such a *blanket* exception to the warrant requirement runs afoul of the Fourth Amendment, and renders meaningless the option of ever securing a search warrant for an OWI blood draw.

Id. at ¶66 (emphasis added). With the issue thus identified, attention may now be paid to how the majority's opinion undermines the Warrant Clause.

B. How Richards *Has Been Eviscerated.*

Much of the problem with the decision in *Krajewski* is derivative not only from how the Wisconsin Supreme Court disregarded this Court's decision in *Richards*, but also of how the Wisconsin Supreme Court used its own precedent, namely *State v. Bohling*, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), as the tool by which to avoid the rigors of *Richards*.

Bohling was a case in which it was determined that "reasonable suspicion," rather than "probable cause," was the condition precedent to employing the exigent circumstances exception to the fourth amendment as the justification for forcibly withdrawing a blood sample from a suspected drunk driver who revokes his implied consent to chemical testing. *Id.* at 523.

A portion of the *Bohling* decision was devoted to developing a test for determining when a suspect's refusal to submit to a blood draw should be honored in lieu of pursuing a forcible withdrawal of blood under the exigent circumstances exception to the fourth amendment. The *Bohling* court held, *inter alia*, that if the accused presents a "reasonable objection" to the blood draw, the draw would not be allowed under the exigent circumstances exception to the fourth amendment. *Id.* at 533-34.

In the *Krajewski* decision, however, the Wisconsin Supreme Court perverted *Bohling* in such a way that it was used to support the proposition that there is a *per se* exigency in a drunk driving case due to the dissipation of alcohol from the body which abrogates the need to ever apply for a warrant because of the exigency's ostensible omnipresence.

Because the dissenting justices in *Krajewski* penned a cogent and compelling description of the problems inherent in the majority's position as it relates to *both* the disregard of *Richards* and the corruption of *Bohling*, it is instructive to quote the dissent at length here:

> The Supreme Court's decision in *Richards* thus calls into question the basis for *Bohling*. *Richards*, along with this court's statement in *Bohling* that exigent circumstances in OWI cases are based "solely on the fact that alcohol rapidly dissipates in the bloodstream,. . . ., "suggests that *Bohling* embodies an impermissible blanket exception to the warrant requirement.
>
> This blanket exception in *Bohling* may have been blurred by the court's articulation of the four factors that must be satisfied to justify a warrantless blood draw. At least some of these factors suggested that the determination of whether a given warrantless search was reasonable remained case-by-case based on individualized circumstances. Today's majority opinion brings *Bohling* into focus. **In practice, application of the four factors rarely, if ever, results in an individualized determination of reasonableness, and the exigent circumstances exception for blood draws in OWI cases embodies the type of blanket rule forbidden under *Richards*.**
>
> . . .

Any veil of uncertainty created by disparate language within *Bohling* is lifted by the majority opinion. Under the majority's opinion, if not also before it, the exigent circumstances exception for blood draws in OWI cases is a blanket rule that runs afoul of *Richards*.

Moreover, the majority's blanket rule runs afoul of its own framework. The majority opinion states that a law enforcement officer who arrests a person for operating under the influence has "three options for obtaining a blood sample," one of which is that the officer "may seek a search warrant to secure a blood draw." Majority op. at ¶¶ 42. However, because an officer may now obtain a forced blood draw without a warrant in virtually every case where the suspect refuses the test, the availability of this third "option" is rendered meaningless.

Finally, I note that the majority opinion discusses obtaining a blood draw to test for controlled substances. The majority states: "Securing a breath test rather than a blood test may not be satisfactory to law enforcement because an officer may want to determine whether the person is also under the influence of controlled substances." Majority op. at ¶¶ 40.

The majority's discussion referencing testing for controlled substances needs clarification to the extent it might be interpreted as an endorsement of any future application of the exigent circumstances exception to testing for controlled substances.

. . .

> Second, and more importantly, any suggestion that the exigent circumstances exception should apply to testing for controlled substances is inapposite to the emergency nature of the exception. *Citing Schmerber v. California*, 384 U.S. 757, 770-71 (1966), the majority emphasizes that the "dissipation of alcohol in the blood stream constituted an emergency because it threatened the destruction of evidence." Majority op. at ¶¶ 27 (internal quotations omitted).
>
> The same purported threat of rapid destruction of evidence may not be present when considering controlled substances. Indeed, evidence of controlled substance use generally dissipates much more slowly from the body than evidence of alcohol use.

Krajewski, 2002 WI 97 at ¶¶73-86 (citation omitted; emphasis added).

The foregoing quote, while lengthy, makes Mr. Krajewski's point for him, namely: the Wisconsin Supreme Court has done away with the need for law enforcement officers to ever apply for a warrant in a drunk driving case. By creating a *per se* "drunk driving exception" to the fourth amendment, the *Krajewski* majority has violated the reasonableness standard imposed by that very provision of the constitution. If this Court does not act, not only will there be a plethora of warrantless, forced blood withdrawals in Wisconsin, but the future extension of this decision into other areas of criminal law will surely continue the slide down the slippery slope of eviscerating the fourth amendment. This

Court must act to prevent what will ultimately be the most tragic landslide appreciable in Wisconsin jurisprudence.

C. Circumvention of the Fourth Amendment's Warrant Requirement Creates a More Significant Problem in Wisconsin Than in Other States Because a First Offense Drunk Driving Case Is Not Deemed by the Legislature to Be Criminal, But Rather, Is Handled As a Purely Civil Matter.

Wisconsin is fairly unique in that its first offense operating while intoxicated cases are purely civil in nature and are not prosecuted criminally under any circumstance. *See* Wis. Stat. § 346.65(2)(a). When the *Krajewski* holding is applied to a first offense drunk driving case, a circumstance is created in which law enforcement officer's are given *per se* authority to avoid the warrant requirement and forcibly withdraw blood from accused drunk drivers because the *"exigency"* of the situation compels the need to gather evidence quickly. Disturbingly, *Krajewski* permits officers to avoid the warrant requirement in a type of case our state legislature has not even seen fit to characterize as criminal. A rhetorical question drives this point home: Would this Court want the exigent circumstances exception to the fourth amendment to be used to circumvent the warrant requirement and thereby justify *per se* the forcible withdrawal of blood in cases which the government does *not* prosecute criminally, but rather prosecutes solely as civil forfeiture violations? *Cf.* Wis. Stat. § 346.65(2)(a) *with* § 346.65(2)(b), *et seq.*.

The reason things are called "exigent" under the fourth amendment is related, at least in part, to the fact that the violation which is being investigated is very serious. It is these "heightened concerns" which give rise to the notion that the circumstances of the situation may permit an avoidance of the need to obtain a warrant. Those "heightened concerns" are to some extent derivative of the fact that the case being investigated is *criminal* in nature, and therefore, very serious when compared to civil forfeiture actions. Unfortunately for first offenders in Wisconsin, those heightened concerns attendant to criminal cases *vis a vis* their very nature is not present in the first offense drunk driving case—as it is purely civil—and therefore, under the auspices of *Krajewski,* forcible blood withdrawals will never be scrutinized by a magistrate because law enforcement officers will never have need to apply for a warrant. It shocks the judicial conscience to think that the constitution would look favorably upon circumvention of the warrant requirement in a case which is not even being prosecuted criminally. Those are the types of cases which are deserving of a *greater* constitutional protection, not lesser.

II. CONSTITUTIONAL "REASONABLENESS" IS VIOLATED WHEN DECISIONS LIKE *KRAJEWSKI* ARE ALLOWED TO STAND.

It is one of the most well-settled and fundamental of all constitutional rules that the test employed under the fourth amendment by which the conduct of law enforcement officers is evaluated is one of reasonableness. U.S. Const. amend. IV; *see, e.g., State v. Boggess,* 115 Wis. 2d 443, 448-49, 340 N.W.2d (1983); *see also Camara v. Municipal Court,* 387 U.S. 523, 528 (1967). To pass constitutional muster under the

fourth amendment a search must be reasonable. *Ohio v. Robinette*, 519 U.S. 33, (1996). It is this standard to which all government conduct must eventually conform.

Contrary to the Wisconsin Supreme Court's implied assertion, the purpose of the fourth amendment is not to continually provide law enforcement officers with new ways of obtaining and securing evidence from individuals. Rather, "[t]he fourth amendment's purpose is to prevent. . . oppressive interference by law enforcement officials with the . . . personal security of individuals." *State v. Reichl,* 114 Wis. 2d 511, 339 N.W.2d 127 (Ct. App. 1983). As earlier noted, this means that the test employed under the fourth amendment by which the conduct of law enforcement officers is evaluated is one of reasonableness. U.S. Const. amend. IV; *see, e.g., Boggess,* 115 Wis. 2d at 448-49; *see also Camara,* 387 U.S. at 528; *Robinette*, 519 U.S. 33.

This reasonableness test is **unavoidable**. Simply because something may be allowed under a theory of exigent circumstance, plain view, search incident to arrest, custodial search, *etc.*, does not mean that the reasonableness standard is abandon as a constitutional requirement. Reasonableness is the umbrella under which all else is measured. As this Court examines the question presented herein, it must always appreciate the larger requirement of reasonableness over asking everything.

With constitutional reasonableness is mind, another among the problems with the Wisconsin Supreme Court's reliance on *State v. Bohling*, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), is it presupposes that evidence of the accused's alcohol concentration will be destroyed unless a blood test is

obtained. This is patently unreasonable to assume in light of how this argument was earlier examined by this Court in *Schmerber v. California*, 384 U.S. 757 (1966). In countenancing forcible withdrawals, this Court made certain to set forth specific conditions which must first be met, namely:

> (1) the officer "reasonably . . . believe[s] that he is confronted with an emergency, in which the delay necessary to obtain a warrant, . . .
>
> (2) threatens 'the destruction of evidence."

Schmerber, 384 U.S. at 770, *quoting Preston v. United States*, 376 U.S. 364 (1964). It is this second prong of the *Schmerber* test which Mr. Krajewski posits is not present in his case, and therefore does not "reasonably" justify a forcible withdrawal of his blood.

The Wisconsin Supreme Court's decision does not recognize that an "exigency" is not a fixed circumstance which, once born, cannot be dissipated. The failure to recognize that exigencies can themselves dissipate caused the court to overlook one very important point made by the *Schmerber* Court. The specific point to which Mr. Krajewski refers is the *Schmerber* Court's statement that "**[i]t would be a different case if the police ... refused to respect a reasonable request to undergo a different form of testing** . . . ." *Id.* at 760 n.4 (emphasis added).

The foregoing assertion expressly acknowledges that this Court based its conclusion of constitutional reasonableness on the fact that there were no other "request[s

from the defendant] to undergo a different form of testing," and intimates that if there had been, the *Schmerber* case "would be . . . different."

Based upon the Court's foregoing observation, the question can be asked: what is the only noteworthy way in which the *Schmerber* case could have been different? Without a doubt the answer must be in holding that the forcible withdrawal was reasonable. No other substantive differences could exist which would have merited the comment the Court made in footnote four. Thus, if meaning is to be given to this Court's admission of a different outcome when a request for "a different form of testing" is made, this Court must give effect to Mr. Krajewski's request for a breath test and reinstate the trial court's decision, otherwise, the language in footnote four will be rendered mere surplusage instead of being instructive on the point.

Unfortunately for the Wisconsin Supreme Court, focusing solely on the issue of whether Mr. Krajewski's objection to blood testing was reasonable under the circumstances misses the very point of Mr. Krajewski's argument, namely: the *exigency* dissipated the moment Mr. Krajewski agreed to submit to an alternative form of chemical testing, and therefore, the exigent circumstances exception to the fourth amendment was no longer a viable alternative for the officer to procure a blood test, and likewise, the dissipation of the exigency thereby made the *Bohling* analysis employed by the court entirely unnecessary and inapplicable.

In other words, the court sought to justify the forcible withdrawal by examining the reasonableness of Mr. Krajewski's objection to testing under the "exigency"of the

circumstances. Such a naive position betrays a lack of understanding of how the reasonableness requirement of the fourth amendment must be employed.

In this case, Mr. Krajewski alleges that had the officers simply permitted him to submit to the breath test as he requested, his submission would have come within three hours of the time of his alleged operation, and thereby would have ostensibly provided the proof of intoxication the State so desperately sought. Judge Erwin even made a finding that a breath test "would be at least as timely as the blood test . . . . " (R33 at 107.) Under the auspices of Wis. Stat. §. 885.235—which provides that a test gathered within three hours of the time of driving is *prima facie* proof of intoxication—any alleged exigency would have dissipated.

Let there also be no mistake that permitting Mr. Krajewski to submit to an alternative form of chemical testing would not have harmed the State in any way. The record is devoid of any allegation that a breath test is not as formidable evidence of intoxication as a blood test. To the contrary, Judge Erwin made a factual finding that "there is no evidentiary support of the State's position that triers of fact accept blood test results more readily than breath or urine analyses." (R33 at 107.) The same presumptions normally associated with a blood test attach to a breath test as well. Thus, the State should not be permitted to cry foul.

CONCLUSION

Based upon the foregoing authority, Petitioner believes that this Court has more than adequate grounds to accept this case for review.

Dated this 31st day of October, 2002.

Respectfully submitted:

ANDEREGG & MUTSCHLER, LLP

By: _____
Christopher A. Mutschler
State Bar No. 1017494

APPENDIX

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Wisconsin Supreme Court Decision. A101-135

Wisconsin Court of Appeals Decision B101-103

Trial Court Findings and Order C101-110

STATE v. KRAJEWSKI, 2002 WI 97,

99-3165-CR

State of Wisconsin,
Plaintiff-Appellant,

v.

Jay D. Krajewski,
Defendant-Respondent-Petitioner.

Oral Argument: November 8, 2001.

Opinion Filed: July 10, 2002.

REVIEW of a decision of the Court of Appeals. Affirmed.

For the defendant-respondent-petitioner there were briefs by Christopher A. Mutschler and Anderegg & Mutschler, LLP, Fond du Lac, and oral argument by Rex Anderegg. For the plaintiff-appellant the cause was argued by Jennifer E. Nashold, assistant attorney general, with whom on the brief was James E. Doyle, attorney general.

¶ 1. DAVID T. PROSSER, J. The issue presented in this case is whether the state may require a warrantless blood draw for alcohol concentration testing from a person who is arrested on probable cause for operating a motor vehicle while under the influence of an intoxicant (OWI), when the person refuses to submit to a requested blood test under the implied consent statute but offers to submit to a breath test in lieu of a blood test.

¶ 2. The circuit court for Jefferson County, Jacqueline R. Erwin, Judge, suppressed the results of the blood test administered to the defendant, Jay D. Krajewski, following his arrest for OWI. The circuit court concluded that a non-consensual blood draw is unreasonable and unconstitutional when a defendant offers to submit to an available and less intrusive method of testing for blood alcohol concentration. The court of appeals reversed, determining that the defendant's case was controlled by this court's decision in State v. Bohling, 173 Wis.2d 529, 494 N.W.2d 399 (1993). The court of appeals ruled that the warrantless blood draw met the requirements established in Bohling and was lawful. State v. Krajewski, No. 99-3165-CR, unpublished order at 3 (Wis.Ct.App. Dec. 5, 2000).

¶ 3. We accepted Krajewski's petition for review and hold that a warrantless nonconsensual blood draw from a person arrested on probable cause for a drunk driving offense is constitutional based on the exigent circumstances exception to the warrant requirement of the Fourth Amendment, even if the person offers to submit to a chemical test other than the blood test chosen by law enforcement, provided that the blood draw complies with the factors enumerated in Bohling. We conclude that the warrantless blood draw in this case was properly based on exigency and complied with factors enumerated in Bohling. Accordingly, we affirm the decision of the court of appeals.

I. FACTUAL BACKGROUND

¶ 4. The facts stated below are based upon testimony at preliminary and suppression hearings as well as stipulations by the parties, documents in the record, and the factual findings of the circuit court. For the purpose of reviewing the circuit court's decision to suppress Krajewski's blood test, the test results are not in dispute.

¶ 5. Wisconsin State Trooper Richard Torrez was on duty in the early morning hours of May 2, 1999. At approximately 1:18 a.m., he stopped a Volkswagen Jetta traveling west on Interstate 94 near Johnson Creek in Jefferson County. The vehicle was driven by Jay Krajewski. Trooper Torrez observed the Krajewski vehicle traveling along the fog line on the right side of the highway. After hugging the fog line for approximately 1,000 feet, the vehicle veered toward the center of the highway, then moved back across the fog line close to the rumble strips for approximately 2,000 feet. The vehicle eventually traveled back across the fog line to the center of the right lane, then switched into the left lane, speeding up by 10 miles per hour as it changed lanes. Torrez followed Krajewski into the left lane, prompting the Krajewski vehicle to move back into the right lane where it subsequently exited the highway to enter a rest area. At that point, Torrez pulled Krajewski over for operating his vehicle erratically and in excess of the speed limit.

¶ 6. When Torrez approached the vehicle, Krajewski told him that he did not have a driver's license but had a state identification card. Torrez noticed that Krajewski's breath smelled of an intoxicant. Krajewski offered that he had consumed three or four beers in the prior 12 hours and had

last consumed alcohol about four hours before he was stopped.[fn1] Krajewski told Torrez that he was driving from Milwaukee to Adams County to check on his parents who had left a phone message early in the morning of May 1, asking him to call them as soon as possible. Krajewski said he was worried about his parents because he had been unable to contact them during the day.

¶ 7. Krajewski agreed to perform field sobriety tests. According to Torrez, Krajewski failed each of the three tests administered.[fn2] Krajewski then submitted to a preliminary breath test (PBT) pursuant to Wis. Stat. § 343.303 (1997-98).[fn3] The results indicated that the alcohol concentration in Krajewski's blood was 0.20.[fn4] Torrez arrested Krajewski for operating a motor vehicle while under the influence of an intoxicant, contrary to Wis. Stat. § 346.63(1)(a).[fn5]

¶ 8. Trooper Torrez testified at the suppression hearing that he was aware that Krajewski had four prior convictions for driving while intoxicated. He also knew that the State Patrol had a policy to request a blood sample for second and subsequent offenses. Consequently, Torrez transported Krajewski to Countryside Home (Countryside) — a county nursing home in Jefferson that administers blood draws — to obtain a blood sample.

¶ 9. When they arrived, Torrez read the "informing the accused" warnings found in Wis. Stat. § 343.305(4), then asked Krajewski if he would submit to a blood draw. Krajewski refused. Krajewski testified that he told Torrez, "that I did not — that I had had a fear of needles and that I did not want to have blood withdrawn from me." Krajewski

further testified that he offered to give either a breath or a urine sample "clearly at least twice."

¶ 10. When Trooper Torrez was told that Countryside's policy was not to draw blood from a person who did not consent to a blood draw, he decided to take Krajewski to Fort Atkinson Memorial Hospital, which he believed would draw blood from a non-consenting person. At the hospital, Torrez again read the informing the accused form to Krajewski. Torrez testified that Krajewski again refused to submit to a blood draw but said he would "dance circles" if he were allowed to contact his parents. Torrez took this to mean that Krajewski would submit to a blood draw if he could first check on his parents.

¶ 11. Sergeant Paul Wallace of the Jefferson County Sheriff's Department, one of four other officers who had been called to meet Torrez at the hospital,[fn6] then spoke to Krajewski, telling him that the officers were going to obtain a blood sample with or without his consent. Wallace testified that Krajewski told him that he wanted to contact his parents. According to Wallace, Krajewski stated that he did not want to take a test for alcohol concentration because if he submitted he would be "[expletive]." Sergeant Wallace told Krajewski that after the blood draw he would help Krajewski contact his parents.

¶ 12. Krajewski refused to submit but advised Sergeant Wallace that he would agree not to resist physically. A registered nurse obtained two blood specimens at approximately 3:25 a.m.[fn7] The resulting blood test showed that the alcohol concentration in Krajewski's blood was 0.219 grams per milliliter, significantly greater than the 0.08 limit

for persons with two or more previous convictions, suspensions, or revocations. See Wis. Stat. § 885.235(1g)(cd). After the blood draw, Krajewski was taken to the Jefferson County Jail. Sergeant Wallace contacted Adams County authorities, who contacted Krajewski's parents. They in turn called to report that they were fine.

¶ 13. The state charged Krajewski with one count of operating a motor vehicle while intoxicated, as a fifth or subsequent offense, contrary to Wis. Stat. §§ 346.63(1)(a), 346.61 and 346.65(2)(e); one count of operating a motor vehicle with a prohibited alcohol concentration, as a fifth or subsequent offense, contrary to Wis. Stat. §§ 346.63(1)(b), 346.61 and 346.65(2)(e); and one count of operating after revocation, as a second offense, contrary to Wis. Stat. §§ 343.44(1) and 351.08.

¶ 14. After the preliminary hearing, Krajewski filed a motion to suppress the results of the blood test, alleging that the seizure of his blood had violated his rights under the state and federal constitutions.[fn8]

¶ 15. Both Trooper Torrez and Sergeant Wallace testified that they could not remember whether Krajewski offered to submit to a breath or urine test. However, the circuit court stated in its order that "[Krajewski] testified unequivocally that he requested a breath test instead of a blood test due to his fear of needles." It found that Krajewski "asked to take a breath test based on fear of needles. A blood test was, nonetheless, taken pursuant to the officer's policy and stated intent to take it by force if necessary." The circuit court determined that Krajewski had impliedly consented to a blood test pursuant to Wis. Stat. § 343.305, but had withdrawn his

consent. It found that the officers could have timely administered a breath test as requested, and that after initially refusing the blood test, Krajewski had submitted "under protest."

¶ 16. The circuit court acknowledged that under Bohling, "forcible blood draws were available under the exigent circumstances exception to the Fourth Amendment." However, relying upon Nelson v. City of Irvine, 143 F.3d 1196 (9th Cir. 1998), the court determined that exigent circumstances are not present when a defendant consents to undergo a test other than a blood test. It ruled that "[W]hen consent to a less intrusive seizure meets a coerced or forcible seizure, the latter method is unreasonable." It therefore granted Krajewski's motion to suppress. This was the order reversed by the court of appeals.

II. STANDARD OF REVIEW

¶ 17. For the purposes of this appeal, there are no genuine issues of material fact. We are presented with the question whether the results of a test for alcohol concentration were obtained in compliance with the exigent circumstances exception to the warrant requirement of the Fourth Amendment to United States Constitution and Article I, Section 11 of the Wisconsin Constitution. This is a question of law that this court reviews de novo. Bohling, 173 Wis.2d at 533.

III. ANALYSIS

¶ 18. This case requires us to decide fundamental questions about the exigency exception to the warrant requirement of

the Fourth Amendment[fn9] and its relationship to Wisconsin's implied consent statute.

A. Implied Consent

¶ 19. Wisconsin has enacted an implied consent statute for motor vehicle operators, Wis. Stat. § 343.305. A person who operates a motor vehicle in this state is deemed to have given consent to one or more tests of his or her blood, breath, or urine upon the request of a law enforcement officer if the person is arrested for a drunk driving offense. Wis. Stat. § 343.305(2).[fn10]

¶ 20. Under Wis. Stat. § 343.305(3)(a), a law enforcement officer may request that a person arrested for OWI provide one or more samples of the person's blood, breath, or urine for testing. A law enforcement officer must then read the implied consent warning to the person, explaining the nature of implied consent, warning of the consequences of refusal to submit to a test of the officer's choice, warning about the consequences of a prohibited alcohol concentration, and informing the person of his or her right to request an alternative test. Wis. Stat. § 343.305(4); State v. Piddington, 2001 WI 24, ¶ 1 n. 3, 241 Wis.2d 754, 623 N.W.2d 528.

¶ 21. The "alternative test" referred to in the statute is not a test of the person's choice in lieu of the test requested by the officer. It is an additional test. The statute reads in part:

If you take all the requested tests, you may choose to take further tests. You may take the alternative test that this law enforcement agency provides free of charge. You also may have a test conducted by a qualified person of your choice at

your expense. You, however, will have to make your own arrangements for that test. Wis. Stat. § 343.305(4).

¶ 22. If a person refuses to submit to the officer's requested test, the officer is required immediately to take possession of the person's license and prepare a notice of intent to revoke. Wis. Stat. § 343.305(9)(a). If a court later determines that the person improperly refused to provide the requested sample or samples for testing, the court is required to revoke the person's operating license for a period of at least one year.[fn11] Wis. Stat. § 343.305(10)(a) and (b)(2).

¶ 23. In this case, the circuit court found that Jay Krajewski "impliedly consented to the chemical testing of his blood by driving. He withdrew that consent and will suffer the consequences of his refusal if it is proved." The circuit court therefore concluded that "[t]he seizure was outside the provisions of § 345,305 [sic] Wis. Stats." The parties do not dispute the circuit court's finding that the blood draw in this case was not conducted pursuant to Wis. Stat. § 343.305.

B. Searches Outside Implied Consent Statute

¶ 24. The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution recognize and protect the right of the people "to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures."[fn12] U.S. Const. amend. IV. In most instances, searches by law enforcement should be conducted pursuant to a search warrant. State v. Prober, 87 Wis.2d 423, 433, 275 N.W.2d 123 (Ct.App. 1978). Searches conducted without a warrant are deemed unreasonable per se unless they fall within one of "a few

specifically established and well-delineated exceptions." Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); State v. Phillips, 218 Wis.2d 180,196, 577 N.W.2d 794 (1998); see also State v. Murdock, 155 Wis.2d 217, 227, 455 N.W.2d 618 (1990) (citing Texas v. Brown, 460 U.S. 730, 735-36 (1983) ("a few carefully delineated exceptions")). Two of the carefully delineated exceptions to the warrant requirement are consent searches and searches based on exigent circumstances. See Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); Schmerber v. State of California, 384 U.S. 757, 771 (1966).

C. Warrantless Searches

¶ 25. Wisconsin Stat. § 343.305 does not explicitly authorize the warrantless search of a driver who withdraws consent and refuses to provide a requested sample for testing under the implied consent statute. However, the text clearly recognizes the possibility of such a search if the search is based upon authority outside the statute. It states: "This section does not limit the right of a law enforcement officer to obtain evidence by any other lawful means." Wis. Stat. § 343.305(3)(c).

¶ 26. We considered this contingency in State v. Zielke, 137 Wis.2d 39, 52, 403 N.W.2d 427 (1987). In Zielke, a police officer induced Zielke to provide a sample of his blood following his involvement in a fatal automobile accident. The procedures "in the implied consent law were concededly not followed." Id. at 40. The circuit court suppressed the results of the blood test, concluding that the implied consent law was the exclusive means by which police may obtain chemical test evidence of driver intoxication. Id. at 41. This court reversed,

stating: "Chemical test evidence may be otherwise legally obtained if it is seized [1] pursuant to a valid search warrant, [2] incident to a lawful arrest, [3] under exigent circumstances supported by probable cause to arrest, or [4] with the consent of the driver." Id. at 52 (citations omitted). See also State v. Gibson, 2001 WI App. 71, ¶¶ 8, 10, 242 Wis.2d 267, 626 N.W.2d 73; State v. Marshall, 2002 WI App. 73, 251 Wis.2d 408, ¶¶ 7-12, 642 N.W.2d 571.

D. Exigent Circumstances

¶ 27. The search in this case was based on exigent circumstances supported by probable cause. The United States Supreme Court determined in Schmerber, 384 U.S. at 772, that a warrantless blood draw from a person arrested for driving while intoxicated was authorized under the exigent circumstances exception to the warrant requirement of the Fourth Amendment. The Supreme Court said: "We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." Id. at 770. The Court concluded that the dissipation of alcohol in the blood stream constituted an emergency because it "threatened `the destruction of evidence.'" Id. (quoting Preston v. United States, 376 U.S. 364, 367(1964)).

¶ 28. One of the questions raised by Schmerber was whether the exigency created by the dissipation of alcohol in the blood stream justifies a warrantless blood draw in every case in which there is probable cause to arrest a person for OWI. Justice Brennan, writing for a deeply divided Court, avoided a clear answer to that question. He noted that Schmerber's involuntary blood test had been taken in a hospital

environment, not a "station house." He added that, "Petitioner is not one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing, such as the `breathalyzer' test petitioner refused." Id. at 771.

¶ 29. The Schmerber opinion skirted such issues as whether the state is ever required to obtain a warrant for a lawfully arrested person's chemical test for alcohol concentration and whether the state is required to respect an arrested person's choice among chemical tests.

¶ 30. These questions were taken up in State v. Bohling, 173 Wis.2d 529, 494 N.W.2d 399 (1993), in which this court expounded on the exigency required for a warrantless blood draw. In Bohling, the court examined the following issue:

[W]hether the fact that the percentage of alcohol in a person's blood stream rapidly diminishes after drinking stops alone constitutes a sufficient exigency [under the relevant constitutional provisions] to justify a warrantless blood draw under the following circumstances: (1) the blood draw is taken at the direction of a law enforcement officer from a person lawfully arrested for a drunk-driving related violation or crime, and (2) there is a clear indication that the blood draw will produce evidence of intoxication. Bohling, 173 Wis.2d at 533 (emphasis added).

¶ 31. This court concluded that under these circumstances, "the dissipation of alcohol from a person's blood stream constitutes a sufficient exigency to justify a warrantless blood draw." Id.

¶ 32. The court pounded home the point, explaining that Schmerber could be read in either of two ways: The rapid dissipation of alcohol in the blood steam alone constitutes a sufficient exigency for a warrantless blood draw to obtain evidence of intoxication following a lawful arrest for drunk driving; or the rapid dissipation of alcohol in the blood stream, coupled with other factors such as an accident, hospitalization, and the lapse of two hours, constitutes exigent circumstances for a warrantless blood draw. Id. at 539. The court chose the former interpretation, thereby rejecting a requirement that an officer seek a search warrant in the period immediately following arrest.[fn13]

¶ 33. The court stated the test:

[A] warrantless blood sample taken at the direction of a law enforcement officer is permissible under the following circumstances: (1) the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk-driving related violation or crime, (2) there is a clear indication that the blood draw will produce evidence of intoxication, (3) the method used to take the blood sample is a reasonable one and performed in a reasonable manner, and (4) the arrestee presents no reasonable objection to the blood draw. Id. at 533-34.

¶ 34. Krajewski attempts to reframe this analysis, asserting that Bohling is "not instructive" in deciding this case. He concedes that the rapid dissipation of alcohol in a person's bloodstream creates an exigency because it threatens the destruction of evidence and that this exigency justifies a forcible blood draw when the person refuses to submit to any chemical test. However, he asserts that once the person offers

to submit to a different chemical test, the exigency disappears and the officer may not proceed with an involuntary test without a search warrant.

¶ 35. Krajewski contends that, absent a search warrant, a law enforcement officer has authority to order an involuntary blood draw from an arrested person who has requested a different chemical test only when: (a) there is not enough time under Wis. Stat. § 885.235 to honor the request;[fn14] (b) the person has made an unreasonable request for a different chemical test (such as a test of chemical deposits on hair); or (c) the person has made no request at all for a different chemical test. A person's "offer to submit to an alternative form of testing" is the sine qua non of Krajewski's "dissipating exigency"theory.

¶ 36. We reject this analysis. Krajewski is correct in asserting that the relevant basis for exigency here is that evidence is likely to be destroyed. See State v. Smith, 131 Wis.2d 220, 230, 388 N.W.2d 601(1986). We do not agree, however, that the exigency disappears as soon as a person agrees to submit to a breath test as opposed to a blood test.[fn15]

¶ 37. The exigency upon which a warrantless blood draw is premised is the dissipation of alcohol in the blood stream. See Schmerber, 384 U.S. at 770-71; Bohling, 173 Wis.2d at 539-40. An arrested person's offer to submit to one chemical test rather than another does not slow this dissipation. The evidence remains on a course to be destroyed.

¶ 38. The evidence continues to dissipate during any time that elapses while the person is transported from a hospital to the site of the instrument for testing breath alcohol. It continues

to dissipate during any wait for the arrival of a certified instrument operator. See Wis. Admin. Code § TRANS 311. It continues to dissipate if the person conveniently regurgitates immediately before the breath test is to be administered so that the certified operator must wait for 20 minutes before the collection of a breath specimen.[fn16] It continues to dissipate if the person fails to give a sufficient breath specimen and/or if the person has a change of heart and refuses altogether to submit to a test.

¶ 39. There is no assurance that a person who refuses to consent to a blood draw under the implied consent statute and refuses to give consent to a blood draw outside the implied consent statute will peacefully cooperate with authorities in submitting to a breath test. In State v. Krause, 168 Wis.2d 578, 484 N.W.2d 347 (Ct.App. 1992), a driver with three OWI convictions refused and resisted law enforcement efforts to secure a chemical test following his arrest for a fourth drunk driving incident. When the driver learned that the police intended to secure a blood sample, he became violently upset, stating that he did not "believe in needles" and did not want to get AIDS. At least three sheriff's deputies were required, at the hospital, to subdue the driver, placing a pillowcase over his head, tying down his feet, and holding his arms while a medical technician drew blood. Id. at 585. The court upheld the reasonableness of the search. The truth is, the officers would have had equal or greater difficulty obtaining a valid breath sample from such a recalcitrant person.

¶ 40. The exigency that exists because of dissipating alcohol does not disappear until a satisfactory, useable chemical test has been taken. Securing a breath test rather than a blood test may not be satisfactory to law enforcement because an officer

may want to determine whether the person is also under the influence of controlled substances. Blood samples are the most direct means of measuring alcohol concentration in the blood and of obtaining evidence of controlled substances in the blood. A breath test is not likely to reveal the presence of a controlled substance. In 1994 the court of appeals reviewed a case in which a driver's blood test showed a blood alcohol concentration of only .049% but the concurrent presence of tetrahydrocannabinol (THC), the active ingredient in marijuana.[fn17] Having a breath test in hand in that instance would not have eliminated the exigency.

¶ 41. Even when a person submits to a breath test in lieu of a blood test — outside the provisions of the implied consent statute — the test may be subject to challenge on grounds that the person's consent to the test was not given freely and voluntarily. State v. Fillyaw, 104 Wis.2d 700, 716, 312 N.W.2d 795 (1981). The person would likely argue that he or she submitted to the breath test because he or she feared needles and had no other choice to avoid a blood draw: it was either a breath test or the feared needle.

¶ 42. A law enforcement officer who arrests a person for operating under the influence has three options for obtaining a blood sample from the person. First, the officer may ask the person to submit to a blood draw under the implied consent statute. Second, the officer may order a blood draw based upon exigent circumstances. Third, the officer may seek a search warrant to secure a blood draw.[fn18] If a person, after refusing a blood test under the implied consent statute, could extinguish the legal basis for a warrantless blood draw merely by agreeing to take a different chemical test, the exigency exception to the warrant requirement would turn upon the

means used for executing the search rather than the urgency involved in the steady dissipation of alcohol. In effect, the arrested person would dictate the terms of investigation, limiting the police to a single option for a blood test — a search warrant.[fn19]

¶ 43. This is not the law. This court will not vest drivers who have been arrested for operating under the influence with the authority to veto constitutional searches to vindicate their personal choice in police procedure.

¶ 44. The state must show probable cause to arrest a person for a drunk driving offense and probable cause to search that person for alcohol or controlled substance concentration if the state seeks a search warrant for a blood draw. The exigency exception approved in Schmerber requires proof of the same two elements, and these elements can be reviewed in a suppression hearing following a warrantless search. Exigency relieves the state of the burden of obtaining a warrant before a search. It does not relieve the state of establishing, in a hearing after the search, that it met the requirements for a constitutional search without a warrant, including the requirement of reasonableness.

¶ 45. Krajewski's arguments do not really bear on exigency. They bear on the reasonableness requirements in the third and fourth prongs of the Bohling test, which the state must satisfy. Under these prongs, the state must show that "the method used to take the blood sample is a reasonable one and performed in a reasonable manner," and "the arrestee presents no reasonable objection to the blood draw." Bohling, 173 Wis.2d at 534.

E. Reasonableness of Blood Test

¶ 46. Krajewski does not dispute that a blood draw can be a legitimate tool for law enforcement officers in a drunk driving case. Rather, he contends that an involuntary blood draw is inadmissible when a person offers "to submit to a less intrusive test."

¶ 47. Krajewski's argument does not attack the method used to secure his blood sample, nor does it suggest a less intrusive method of obtaining a blood specimen from him or others. In fact, he offers no objection to the manner in which the blood draw was performed in this case. Krajewski and the State stipulated that the blood draw was taken in a hospital by a registered nurse. Thus, the blood draw was effected in a reasonable manner. See State v. Thorstad, 2000 WI App. 199, ¶ 15, 238 Wis.2d 666, 618 N.W.2d 240. In short, Krajewski has no complaint under the third prong of the Bohling test.

F. No Reasonable Objection

¶ 48. Krajewski does offer several objections to his involuntary blood draw under the fourth prong. He contends that he had a fear of needles, that he offered to take a breath test, that he was entitled to take a "less intrusive" test than a blood test when he offered to do so, and that he had a right to refuse medical treatment. We address each of these objections in turn.

¶ 49. The circuit court found that "the defendant asked to take a breath test based on fear of needles." The record does not provide evidence that Krajewski explained the basis for his

alleged fear; but it does provide evidence — in the testimony of Sergeant Wallace — that Krajewski was reluctant to take any chemical test for alcohol concentration and that he eventually submitted to a blood draw without incident. Consequently, while we do not dispute for purposes of this case that Krajewski expressed a fear of needles, we see no reason to treat his alleged fear as different from an articulated preference for a different chemical test.

¶ 50. In Krause, the defendant told officers that he did not believe in needles and that he did not want to get AIDS. 168 Wis.2d at 585. The court of appeals correctly observed that "These isolated comments do not establish that Krause is `one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing.'" Id. at 588 (citing Schmerber, 384 U.S. at 771).[fn20]

¶ 51. The implied consent statute limits the viable excuses of a medical or physical nature for refusal to submit to a chemical test: The person shall not be considered to have refused the test if it is shown by a preponderance of evidence that the refusal was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol, controlled substances, controlled substance analogs or other drugs. Wis. Stat. § 343.305(9)(a)5.c.

¶ 52. We think this provision represents a valid standard to apply in situations outside the statute. It is a standard that will permit a different chemical test for a person who shows that he or she is a hemophiliac or suffers from some other ailment that renders him or her unable to reasonably submit to a blood test. Krajewski has not satisfied this standard. Ironically, a person who alleges fear of needles to prevent a blood draw

may in fact be physically unable, as the result of an accident, to submit to a breath test. This is another situation in which exigency clearly remains, even after the person offers to take a different chemical test.

¶ 53. Krajewski objects that it was not reasonable to subject him to an involuntary blood draw when he offered to take a breath test. A similar argument was presented in State v. Wodenjak, 2001 WI App. 216, 247 Wis.2d 554, 634 N.W.2d 867, where the driver refused the requested blood test and asked if he could take a breath test. The driver ultimately submitted to a blood draw but argued later that the blood draw was unreasonable and unconstitutional. The court of appeals relied upon Bohling and Thorstad to reject the driver's position. The court noted that Wodenjak's offer to take a breath test distinguished his case factually from Bohling and Thorstad but it concluded that the holdings in those cases still apply when a defendant offers to take a different chemical test. Id. at 561. We agree.

¶ 54. Wisconsin Stat. § 343.305(2) authorizes tests of "breath, blood or urine, for the purpose of determining the presence or quantity" of alcohol in a person who operates a motor vehicle upon Wisconsin highways. Wisconsin statutes have recognized chemical tests for intoxicants since at least the late 1940s. See Wis. Stat. § 85.13(2) (1949-50). Breath, blood, and urine tests are reliable and admissible in evidence. See Wis. Stat. § 885.235.

¶ 55. In enacting the implied consent statute, the legislature authorized a law enforcement officer to request his or her choice among these three chemical tests and to request more than one chemical test from a person arrested for a drunk

driving offense. In the absence of compelling evidence otherwise, we must presume that the legislature had good reasons for giving law enforcement officers the right to choose among chemical tests. These reasons could include the fact that one test may be better able to detect the presence of controlled substances than another; one test may be more efficacious as evidence before a jury than another; one test may be less susceptible to attack in court than another; one test may be more readily available on any given occasion than another;[fn21] and tests taken in a hospital permit observation of an intoxicated person by a medical professional before the person is taken to jail. These reasons are equally valid for chemical tests taken outside the implied consent statute.

¶ 56. We note that in Wodenjak, 2001 WI App. 216, ¶ 2 n. 3, and in this case, officers testified that they could not remember the two drivers asking for a different chemical test. Courts in both cases accepted the drivers' statements of what they requested. However, many defendants would likely "remember" asking for a breath test after submitting to a blood draw if the rule proposed by Krajewski were adopted by this court.

¶ 57. Blood draws to test for alcohol concentration are so commonplace, so accepted, so likely to be reasonable in their execution that a person's mere preference for a different test cannot be viewed as significant in a constitutional sense.

¶ 58. This is also part of the answer to Krajewski's third objection, that he was entitled to take a "less intrusive" test when he offered to do so.

¶ 59. Krajewski points to Winston v. Lee, 470 U.S. 753, 759 (1985) for the proposition that a government search should not be "more intrusive than reasonably necessary to accomplish its goals." The proposed search in Winston involved surgery under a general anesthetic to remove a bullet lodged in a suspect's chest. The Supreme Court concluded that the "magnitude" of the intrusion made this "search" unreasonable even though it was likely to produce evidence of a crime. Id.

¶ 60. We do not perceive the intrusion here and the intrusion in Winston as comparable. The intrusion in the usual blood draw is slight and does not constitute an unreasonable law enforcement practice. It does not threaten the individual's safety or health. Moreover, the Supreme Court has "repeatedly refused to declare that only the `least intrusive' search practicable can be reasonable under the Fourth Amendment." Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 663 (1995). See also U.S. v. Sharpe, 470 U.S. 675, 686-87 (1985); Illinois v. Lafayette, 462 U.S. 640, 647 (1983); Cady v. Dombrowski, 413 U.S. 433, 447 (1973).

¶ 61. Krajewski also objects that he is constitutionally entitled to refuse medical treatment if he is willing to submit to a breath test. He cites no authority to support this novel proposition, which if accepted, would justify refusal to submit to a blood draw both under the Fourth Amendment and the implied consent statute. Considering the long history of authorized blood tests in the United States, this objection is meritless. We do not accept it.

¶ 62. To attack the blood test using the Bohling factors, Krajewski has made several general objections that could have been offered by any driver arrested for operating under the influence. Acceptance of any one of these general objections by this court would undercut the implied consent statute and create chaotic consequences for enforcement of the law. The objections are artful but they are not reasonable. The surest way for a driver to avoid a blood draw for alcohol concentration is never to drink and drive.

IV. CONCLUSION

¶ 63. In summary, we reaffirm that the rapid dissipation of alcohol in the bloodstream creates an exigency that justifies a nonconsensual test of the blood, breath, or urine of a person arrested for driving while intoxicated or other similar drunk-driving related offenses, so long as the test is administered pursuant to the factors enumerated in Bohling. Specifically, the blood draw must be taken "to obtain evidence of intoxication from a person lawfully arrested for a drunk-driving related violation or crime," there must be "a clear indication that the blood draw will produce evidence of intoxication," the blood sample must be taken by a reasonable method and in a reasonable manner, and the arrestee must present "no reasonable objection to the blood draw." Bohling, 173 Wis.2d at 534. We further hold that a person's agreement to submit to a test of the person's choice does not negate the exigency, nor render unconstitutional a nonconsensual test of the officer's choice.

¶ 64. We conclude from the facts presented that the nonconsensual blood draw administered to Krajewski complied with the standards established in Bohling, as it was

taken to obtain evidence of intoxication after Krajewski was arrested for driving while intoxicated, there was probable cause to believe that the blood draw would produce evidence of intoxication, the blood sample was taken in a reasonable manner, and Krajewski presented no reasonable objection. The blood draw was therefore reasonable and constitutional.

¶ 65. We therefore affirm the court of appeals decision which summarily reversed the circuit court order granting Krajewski's motion to suppress the results of the blood test administered in this case. By the Court. — The decision of the court of appeals is affirmed. [fn1] Trooper Torrez testified that Krajewski later altered his story, saying that he had four or five beers and that he had finished drinking two hours before he was stopped. [fn2] Krajewski does not contest the validity or the results of the field sobriety tests for the purposes of this appeal. [fn3] All subsequent references to the Wisconsin Statutes are to the 1997-98 version unless otherwise specified. [fn4] Wisconsin Stat. § 885.235(1)(a) provides that, "`Alcohol concentration' means the number of grams of alcohol in 100 milliliters of a person's blood or the number of grams of alcohol in 210 liters of a person's breath." [fn5] "[A]n alcohol concentration of 0.1 or more is prima facie evidence that [a person] was under the influence of an intoxicant." Wis. Stat. § 885.235(1g)(c). However, "[i]n cases involving persons who have 2 or more prior convictions, suspensions, or revocations . . . an alcohol concentration of 0.08 or more is prima facie evidence that [the person] was under the influence of an intoxicant." Wis. Stat. §885.235(1g)(cd). [fn6] Krajewski testified that upon learning that he would be taken to a different facility for a blood draw, he told Torrez: "Well, you had better call some friends because I'm not going to give it willingly." [fn7] The parties

stipulated, for the purposes of the preliminary hearing, that the blood samples obtained by the registered nurse were obtained according to normal procedures. [fn8] Krajewski also brought a motion claiming that Wisconsin's implied consent statute, Wis. Stat. § 343.305, is unconstitutional. The circuit court denied the motion, and Krajewski does not appeal the ruling. [fn9] The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution are virtually identical. Both establish the right of persons to be secure from unreasonable searches and seizures. Consequently, this court interprets the two constitutional provisions in concert. State v. Rutzinski, 2001 WI 22, ¶ 13, 241 Wis.2d 729, 623 N.W.2d 516; State v. Richter, 2000 WI 58, ¶ 27, 235 Wis.2d 524, 612 N.W.2d 29. [fn10] Wisconsin Stat. § 343.305(2) provides in relevant part:

Any person who . . . operates a motor vehicle upon the public highways of this state . . . is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol, controlled substances, controlled substance analogs or other drugs, or any combination of alcohol, controlled substances, controlled substance analogs and other drugs, when requested to do so by a law enforcement officer under sub. (3)(a) or (am) or when required to do so under sub. (3)(b). [fn11] The length of the revocation is dependent upon the number of prior suspensions, revocations and convictions, as calculated under Wis. Stat. § 343.307. Wis. Stat. § 343.305(10). [fn12] The Fourth Amendment to the United States Constitution provides: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue,

but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. Article I, Section 11 to the Wisconsin Constitution provides: Searches and seizures. SECTION 11. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized. [fn13] The court cited a number of court decisions interpreting Schmerber to support its conclusion: State v. Bentley, 92 Wis.2d 860, 861-62, 286 N.W.2d 153 (Ct.App. 1979); United States v. Reid, 929 F.2d 990, 991-92 (4th Cir. 1991); State v. Baker, 502 A.2d 489, 493 (Me. 1985); Gregg v. State, 374 So.2d 1301, 1302 (Miss. 1979); State v. Milligan, 748 P.2d 130, 134-35 (Or. 1988). State v. Bohling, 173 Wis.2d 529, 542-44, 494 N.W.2d 399 (1993). [fn14] Wisconsin Stat. § 885.235, Chemical tests for intoxication, provides in part: (1g) In any action or proceeding in which it is material to prove that a person was under the influence of an intoxicant or had a prohibited alcohol concentration or a specified alcohol concentration while operating or driving a motor vehicle . . . evidence of the amount of alcohol in the person's blood at the time in question, as shown by chemical analysis of a sample of the person's blood or urine or evidence of the amount of alcohol in the person's breath, is admissible on the issue of whether he or she was under the influence of an intoxicant or had a prohibited alcohol concentration or a specified alcohol concentration if the sample was taken within 3 hours after the event to be proved (emphasis added). [fn15] The circuit court relied heavily on Nelson v. City of Irvine,

143 F.3d 1196 (9th Cir. 1998), for the principle that exigent circumstances are negated when a defendant offers to submit to a test other than the test requested by law enforcement. Nelson can be distinguished on its facts. We believe that, to the extent its opinion went beyond the special facts of the case, the Nelson court was not correct in its explanation of exigency. Nelson involved a California implied consent statute that granted persons arrested for driving while intoxicated the choice of which type of sample they would give — a breath, blood, or urine sample. See Cal. Veh. Code § 23157 (1997-98) (current version at Cal. Veh. Code § 23162 (2001-2002)); Nelson, 143 F.3d at 1201. The Ninth Circuit determined that no exigent circumstances exist justifying the nonconsensual taking of a blood sample from a person who agrees to give a different sample of his or her choice. It stated that: When an arrestee requests but is denied the choice of an available breath or urine test, the exigency used to justify the warrantless blood test continues only because of the City's failure to perform the requested alternative test. Whenever a DUI arrestee consents to a breath or urine test, and such tests are available, the administration of either the breath or urine test would preserve the evidence and end the exigency. Nelson, 143 F.3d at 1205. Nelson is distinguishable from this case because in Nelson, the drivers did not withdraw their consent to give some sample under the statute. They had a statutory right to provide a sample of their choice. Because several of the drivers offered to provide precisely what the statute required, in the manner the statute required, no exigent circumstances existed to allow the officers to require a different type of test. We believe the decision assumes that the drivers will fully cooperate and take the tests. Wisconsin's implied consent law does not grant drivers a statutory right to choose which test will be

administered. See State v. Wodenjak, 2001 WI App. 216, ¶ 13 n. 8, 247 Wis.2d 554, 634 N.W.2d 867. In Wisconsin, a driver impliedly consents to take the test requested by a law enforcement officer. When the driver refuses to take that test, the driver has withdrawn his or her consent — officers must yield to that decision or proceed in a lawful manner outside the statute. [fn16] Wisconsin Admin. Code § TRANS 311.06 (1997), provides in relevant part: (3) Procedures for quantitative breath alcohol analysis shall include the following controls in conjunction with the testing of each subject:

(a) Observation by a law enforcement person or combination of law enforcement persons, of the test subject for a minimum of 20 minutes prior to the collection of a breath specimen, during which time the test subject did not ingest alcohol, regurgitate, vomit or smoke. [fn17] See State v. Sanders, No. 93-2284-CR, 93-2286-CR, unpublished slip op. (Wis.Ct.App. Sept. 8, 1994). Unpublished opinions of the court of appeals have no precedential value and may not be cited as precedent or authority. Wis. Stat. (Rule) § 809.23(3). This case is cited merely to illustrate a potential fact situation. [fn18] In normal circumstances, the officer should pursue the first option, requesting and urging a person's cooperation and voluntary compliance under the implied consent statute, before exploring the other options. The officer's incentives for seeking compliance under the implied consent statute are discussed in State v. Zielke, 137 Wis.2d 39, 48-50, 403 N.W.2d 427 (1987). [fn19] Obtaining a search warrant to authorize a blood draw may present practical difficulties. The principal difficulty is reaching a judge or court commissioner after normal working hours. Many counties have only one judge. Judges cannot always be found at their office or home.

In addition, when a law enforcement officer seeks a warrant by telephone under Wis. Stat. § 968.12(3)(d), either the judge or the officer must be at a location with equipment to record the proceedings. This court recently reviewed a case in which the authorities inadvertently failed to record a telephone application for a warrant. State v. Raflik, 2001 WI 129, 248 Wis.2d 593, 636 N.W.2d 690.

In any event, there is no assurance that a drunk driver presented with a search warrant will abandon his or her resistance and politely submit to a blood test. As Krajewski succinctly put it, he did not want to take a test for alcohol concentration because if he did he would be"[expletive]." [fn20] The same conclusion has been reached in other states. See Stanger v. Department of Revenue, 780 P.2d 64, 65 (Colo.Ct.App. 1989); Glazner v. State, 318 S.E.2d 233 (Ga.Ct.App. 1984); Borgen v. Director of Revenue, 877 S.W.2d 172 (Mo.Ct.App. 1994); Ruch v. Conrad, 526 N.W.2d 653, 656 (Neb. 1995). Pennsylvania courts have consistently rejected the fear-of-needles justification for refusal. See Com. D.O.T. Bur. of Dr. Lic. v. Mease, 610 A.2d 76, 78 (Pa.Commw.Ct. 1991)(citing other Pennsylvania cases). [fn21] The court of appeals recently considered a case in which an officer took a driver to a hospital for a blood test after the officer was informed that the county's intoxilizer room was not operational. See State v. Salm, No. 01-2443-FT, unpublished slip op. (Wis.Ct.App. Mar. 13, 2002). Unpublished opinions of the court of appeals have no precedential value and may not be cited as precedent or authority. Wis. Stat. (Rule) § 809.23(3). This case is cited merely to illustrate a potential fact situation.

¶ 66. ANN WALSH BRADLEY, J. (dissenting).

The majority sets forth a blanket rule employing the exigent circumstances exception allowing forced blood draws in OWI cases. Such a blanket exception to the warrant requirement runs afoul of the Fourth Amendment, and renders meaningless the option of ever securing a search warrant for an OWI blood draw. In addition, I write separately to clarify any implication in the majority opinion that exigent circumstances might exist in cases where it is a controlled substance, not alcohol, that allegedly forms the basis for an arrest. Accordingly, I respectfully dissent.

¶ 67. In State v. Bohling, 173 Wis.2d 529, 539, 494 N.W.2d 399 (1993), this court determined in a 4-3 decision that exigent circumstances in OWI cases are based "solely on the fact that alcohol rapidly dissipates in the bloodstream." At the same time, and somewhat inconsistently, the Bohling court set forth four factors that must be satisfied for the police to forego a warrant: (1) the blood draw is taken to obtain evidence of intoxication from a person lawfully arrested for a drunk-driving related violation or crime, (2) there is a clear indication that the blood draw will produce evidence of intoxication, (3) the method used to take the blood sample is a reasonable one and performed in a reasonable manner, and (4) the arrestee presents no reasonable objection to the blood draw. 173 Wis.2d at 533-34 (footnote omitted).

¶ 68. The dissent in Bohling observed that "the majority opinion holds that the exigency created by the dissipation of alcohol makes seizure of a blood sample without a warrant reasonable per se under the Fourth Amendment." 173 Wis.2d at 548 (Abrahamson, J., dissenting). Although the dissent acknowledged that the exigent circumstances exception may be applied to the seizure of blood, it rejected the Bohling

majority's blanket exception to the warrant requirement, concluding that law enforcement officers and courts must examine the facts on a case-by-case basis to satisfy the Fourth Amendment. Id. at549-550.

¶ 69. After Bohling, this court devised another blanket exception to the Fourth Amendment based on exigent circumstances. In State v. Stevens, 181 Wis.2d 410, 425-26, 511 N.W.2d 591 (1994), the court held that based on the destructibility of the evidence, a no-knock search is reasonable any time the police have a warrant, supported by probable cause, to search a residence for evidence of drug dealing.

¶ 70. Subsequently, in Wilson v. Arkansas, 514 U.S. 927, 93O (1995), the U.S. Supreme Court concluded that the common law knock and announce principles form a part of the Fourth Amendment reasonableness inquiry. In reaching its conclusion, the Court in Wilson peppered its decision with language warning that blanket exceptions to the knock and announce requirement were impermissible.

¶ 71. After Wilson, this court decided State v. Richards, 201 Wis.2d 845, 549 N.W.2d 218 (1996). The court in Richards explained that it took the case to address the vitality of Stevens in light of the Supreme Court's warning in Wilson. Id. at 848. Nonetheless, this court did not heed the warning. It reaffirmed the Stevens rule, holding that exigent circumstances were always present in the execution of search warrants involving felonious drug delivery, based in part on the potential for the disposal of drugs prior to entry by the police. Id. at847-48.

¶ 72. The U.S. Supreme Court promptly overturned us, abrogating the blanket rule. See Richards v. Wisconsin, 520 U.S. 385 (1997). The Court concluded that a concurring opinion in Richards, not the majority, had correctly stated the law under the Fourth Amendment. Id. at 391, 395. The concurring opinion repeated the concerns of the dissent in Bohling, emphasizing that the Fourth Amendment requires an assessment of reasonableness based on the facts of each particular case. Richards, 201 Wis.2d at 878 (Abrahamson, J., concurring).

¶ 73. The Supreme Court's decision in Richards thus calls into question the basis for Bohling. Richards, along with this court's statement in Bohling that exigent circumstances in OWI cases are based "solely on the fact that alcohol rapidly dissipates in the bloodstream," Bohling, 173 Wis.2d at 539, suggests that Bohling embodies an impermissible blanket exception to the warrant requirement.

¶ 74. This blanket exception in Bohling may have been blurred by the court's articulation of the four factors that must be satisfied to justify a warrantless blood draw. At least some of these factors suggested that the determination of whether a given warrantless search was reasonable remained case-by-case based on individualized circumstances.

¶ 75. Today's majority opinion brings Bohling into focus. In practice, application of the four factors rarely, if ever, results in an individualized determination of reasonableness, and the exigent circumstances exception for blood draws in OWI cases embodies the type of blanket rule forbidden under Richards.

¶ 76. The first and second of the four Bohling factors amount to no more than probable cause to arrest for drunk driving. However, probable cause is already a requirement under the exigent circumstances exception to the warrant requirement. See State v. Hughes, 2000 WI 24, ¶ 17, 233 Wis.2d 280, 607 N.W.2d 621.

¶ 77. The third factor has been held to be satisfied by any taking of blood in a "medical setting" or "medical environment." State v. Wodenjak, 2001 WI App. 216, ¶ 12, 247 Wis.2d 554, 634 N.W.2d 867, review denied, 2001 WI 117, 247 Wis.2d 1036, 635 N.W.2d 784 (unpublished table decision); State v. Thorstad, 2000 WI App. 199, ¶ 15, 238 Wis.2d 666, 618 N.W.2d 240, review denied, 2000 WI 121, 239 Wis.2d 310, 619 N.W.2d 93 (unpublished table decision). In reality then, the blood draw will satisfy this factor in virtually all cases.

¶ 78. Thus, the fourth factor is the only one that might seem to suggest that warrantless blood draws in OWI cases would remain subject to a case-by-case, particularized reasonableness determination as required by the Fourth Amendment. However, the majority has eviscerated that factor today.

¶ 79. The majority adopts the statutory standard for refusal under the implied consent statute as the constitutional standard for a reasonable objection. Majority op. at ¶¶ 51-52. Under this standard, the only reasonable objection is a physical inability to submit to the test. This standard leaves no room for, among other things, a legitimate objection based on religious grounds. Thus, only in the most rare of cases will the fourth factor ever preclude a warrantless blood draw.

¶ 80. Any veil of uncertainty created by disparate language within Bohling is lifted by the majority opinion. Under the majority's opinion, if not also before it, the exigent circumstances exception for blood draws in OWI cases is a blanket rule that runs afoul of Richards.

¶ 81. Moreover, the majority's blanket rule runs afoul of its own framework. The majority opinion states that a law enforcement officer who arrests a person for operating under the influence has "three options for obtaining a blood sample," one of which is that the officer "may seek a search warrant to secure a blood draw." Majority op. at ¶ 42. However, because an officer may now obtain a forced blood draw without a warrant in virtually every case where the suspect refuses the test, the availability of this third "option" is rendered meaningless.

¶ 82. Finally, I note that the majority opinion discusses obtaining a blood draw to test for controlled substances. The majority states: "Securing a breath test rather than a blood test may not be satisfactory to law enforcement because an officer may want to determine whether the person is also under the influence of controlled substances." Majority op. at ¶ 40.¶ 83. The majority's discussion referencing testing for controlled substances needs clarification to the extent it might be interpreted as an endorsement of any future application of the exigent circumstances exception to testing for controlled substances.

¶ 83. First, to the extent the majority's discussion of controlled substances makes such a suggestion, it is dicta. The case before us did not involve any alleged controlled substance use.

¶ 84. Second, and more importantly, any suggestion that the exigent circumstances exception should apply to testing for controlled substances is inapposite to the emergency nature of the exception. Citing Schmerber v. California, 384 U.S. 757, 770-71 (1966), the majority emphasizes that the "dissipation of alcohol in the blood stream constituted an emergency because it threatened the destruction of evidence." Majority op. at ¶ 27 (internal quotations omitted).

¶ 85. The same purported threat of rapid destruction of evidence may not be present when considering controlled substances. Indeed, evidence of controlled substance use generally dissipates much more slowly from the body than evidence of alcohol use. See State v. Jones, 895 P.2d 643, 644 (Nev. 1995); Emily J. Sovell, State v. Hanson: Has the Exigent Circumstances Exception to the Warrant Requirement Swallowed the Rule?, 45 S.D. L. Rev. 163, 185 (2000).

¶ 86. In sum, the majority opinion sets forth a blanket rule under the exigent circumstances exception allowing warrantless blood draws in OWI cases. Because the Fourth Amendment does not countenance such a blanket rule, I respectfully dissent.

¶ 87. I am authorized to state that SHIRLEY S. ABRAHAMSON, CHIEF JUSTICE, joins this dissent.

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December 5, 2000

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You are hereby notified that the Court has entered the following opinion and order:

99-3165-CR State of Wisconsin v. Jay D. Krajewski
(L.C. # 99-CF-158)

Before Vergeront, Roggensack and Deininger, JJ.

The State of Wisconsin appeals an order suppressing a blood test. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (1997-98). We reverse.

Defendant Jay Krajewski moved to suppress a blood test. The circuit court found that Krajewski first offered to take a breath test and expressed a fear of needles. A blood test was nevertheless taken, pursuant to the officer's policy and stated intent to take it by force if necessary. The circuit court suppressed the blood test. The court relied on ***Nelson v. City of Irvine***, 143 F.3d 1196 (9th Cir. 1998), to conclude that where an equally valid test is available with the defendant's consent, the exigent circumstance exception to the requirement for a search warrant is unavailable.

Since the circuit court's ruling, we held that ***Nelson*** is not binding in Wisconsin. ***State v. Thorstad***, 2000 WI App. 199, ¶9, ____Wis. 2d ___, 618 N.W.2d 240, *review denied*, 2000 WI 121 (Wis. Oct. 17, 2000). We further held that, to the extent ***Nelson*** is in conflict with the exigent circumstance analysis of ***State v. Bohling***, 173 Wis. 2d 529, 492 N.W.2d 399 (1993), or an earlier United States Supreme Court opinion, it is not for this court to resolve that conflict. ***Id.*** We held that if the requirements of ***Bohling*** are met, our inquiry need go no further. ***Id.*** at ¶11.

The ***Thorstad*** opinion resolves most of the issues argued in this appeal. The remaining question is whether the requirements of ***Bohling*** were met. It appears that only one

of those requirements may be in dispute: whether the arrestee presented a reasonable objection to the blood draw. ***Id.*** at ¶7. In ***Thorstad*** we declined to "delineate what sorts of objections might be considered reasonable" because Thorstad did not present any objections at all, and did not give any indication that he would prefer another test. ***Id.*** at ¶16. In the present case, however, Krajewski expressed a preference for a breath test and expressed a fear of needles. The State argues on appeal that this was not a reasonable objection. In response, Krajewski argues in support of the circuit court's finding that he expressed such a fear, but he does *not* argue in any way that this expression should be considered a reasonable objection under ***Bohling***. We take this silence as a concession. *See* ***Charlais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Accordingly, we conclude that the requirements of ***Bohling*** were met and the warrantless blood test was lawful.

IT IS ORDERED that the order appealed is summarily reversed, and the cause is remanded, under WIS. STAT. RULE 809.21.

Cornelia G. Clark
Clerk of Court of Appeals

STATE OF WIS. CIRCUIT COURT JEFFERSON CO.

STATE OF WISCONSIN,
Plaintiff,

-vs-

DECISION
Case No. 99 CF 158

JAY D. KRAJEWSKI,
Defendant.

A. Defendant's Motion to Suppress Chemical Test Evidence on Due Process Grounds.

The officer who arrested Jay D. Krajewski complied with sec. 343.305(4), Wis. Stats., by advising Mr. Krajewski "if any test shows more alcohol in your system than the law permits while driving, your operating privileges will be suspended. If you refuse to take any tests that the agency requests, your operating privilege will be revoked and you will be subject to other penalties." Mr. Krajewski subsequently refused to take the chemical test. Blood was drawn nontheless and the State has charged him with operating while intoxicated and with prohibited alcohol concentration, as fifth or subsequent offenses, subjecting him to felony penalties.

The defendant asserts his constitutional right to due process has been violated since the information provided to him, as cited above, overstates penalties for refusing the chemical test and understates penalties which may follow submission to a chemical test. The State responds that the

information goes only to consequences under sec. 343.305(4), Wis. Stats., and is, therefore, accurate. The court denies defendant's motion to suppress.

Statutes are presumed constitutional. Challengers bear the burden of proof beyond a reasonable doubt to show otherewise. *State ex rel. Vanderbloemen v. Town of West Bend*, 188 Wis. 2d 458, 464, 525 N.W2d 133 (Ct. App. 1994). Defendant has not met this burden.

An ordinary language reading of sec. 343.305(4), Wis. Stats., is as argued by the State, that is, simply reflective of 343.305 consequences to submitting to or refusing the requested test. Within the framework of 343.305, a prohibited alcohol concentration result test results in suspension of operating privilege. Refusal to submit results in revocation or operating privilege, along with other consequences within 343.305 (submission to assessment, compliance with a driver's safety plan, vehicle immobilization, ignition interlock device or vehicle seizure and forfeiture pursuant to 343.305(10) and (10m), Wis. Stats.). The warning advises that the fact of refusal may be used against the driver. With this warning mandated by the Legislature, drivers receive a straight forward, streamlined, self-contained and accurate statement of consequences to their decisions within the implied consent law. The due process clauses require no more.

Defendant argues that more is required of the State by way of warnings, that the "other penalties" language subtly misleads a driver into submitting to a test, the consequences of which are "grossly" understated. Specifically, Defendant argues that drivers should be warned that test results may be used in prosecution for criminal offenses and that other

sanctions as enumerated above must be articulated. The courts have previously advised that consequences such as habitual traffic offender exposure and increased insurance rates are not the kind of warnings that must be provided by the Court to offenders, an analogy available here. the Legislature has reasonably determined to require warnings within the implied consent law and not beyond.

The Court agrees with the rationale of the unpublished decision *State v. Smith*, (No. 99-0760), Judge Nettesheim writing:

> . . . A complete list of the penalties for refusal is contained within § 343.305(10), Stats. However, § 343.305(4) does not mandate warning an OWI suspect about these penalties.
>
> . . . To require that the suspect be advised of all the enhanced penalties which might flow from a refusal or from a test which produces a prohibited alcohol concentration result would only serve to make the process of informing the accused too convoluted to be helpful. Furthermore, "an officer's only duty under the implied consent law is to accurately deliver the information [from § 343.305(4)] to the driver; an officer need not explain all of the choices (and resulting consequences) embodied within these statutes" *Quelle*, 198 Wis. 2d at 285, 542 N.W.2d at 202. Put another way, the accused is entitled to limited and basic information under the implied consent law, not a full explanation or thorough legal advice.

B. Defendant's Motion to Dismiss Count 2.

Because sec. 885.235 presumes that an alcohol concentration of 0.08 or 0.1 or more is prima facie evidence that a driver was "under the influence of an intoxicant", Defendant argues that prosecution of him under sec. 346.63(1)(b), Wis. Stat., is violative of the due process clause. Specifically, Defendant argues double jeopardy, issue preclusion and fundamental fairness. The State argues that sec. 885.235 is permissive only, that the rationale of *State v. Bohacheff*, 114 Wis. 2d 402, 338 N.W.2d 466 (1983) militates denial of the motion, that only one punishment is available and it is in a single prosecution, thereby rendering an issue preclusion analysis inapplicable. The Court denies the motion to dismiss count 2.

On this constitutional challenge, the defendant bears the burden as cited above and has not met that burden. The strongest argument in support of the constitutionality of this legislation is the permissive nature of the statute and instruction based thereon. The truism cited in *Bohacheff* at page 415 is in accord: " . . . There may be situations where a person with less than .10% blood alcohol concentration is 'under the influence' and a person with .10% or more blood alcohol concentration is not." That the trier of fact may find from evidence of a prohibited alcohol concentration test result a driver under the influence does not render a prohibited alcohol concentration charge the same in fact and law as a charge of driving while under the influence of an intoxicant.

Defendant urges an issue preclusion analysis. Both parties cite the Court to *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L.Ed. 2d 469 (1970). Plaintiff correctly points out that the definition given issue preclusion (then termed

collateral estoppel) applies " . . . when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." (L. Ed. pg. 475). The case at bar is not subsequent prosecution and Defendant's argument that this is a mere technical variation is not convincing in view of the dearth of supporting authority.

Finally, Defendant argues that although issue preclusion may not be applicable, the due process concept of fundamental fairness is and requires dismissal. Defendant argues that this is the issue left unaddressed by the Court in *Bohacheff*. However, Defendant does not articulate separate arguments from those addressed above and the Court, therefore, makes no different findings than those made above.

C. Motion to Suppress on Coerced Blood Withdrawal

Defendant moves the Court to suppress the blood test result from a test taken contrary to his affirmative consent. Mr. Krajewski argues that he submitted to the test under protest because officers told him the blood would be withdrawn with or without his cooperation. Further, Mr. Krajewski testified and argues that because he offered to submit to a different type of test, the officer's verbal coercion violated is right against unreasonable seizure. The State responds that no such alternate test offer was made by the defendant and that the warrantless seizure was constitutionally permissible under the exigent circumstance exception. The State bears the burden on this issue and has not met it. The Court, therefore, grants the defendant's motion to suppress the results of his blood test.

Extensive testimony was taken regarding events surrounding the defendant's arrest and ensuing chemical test. Defendant testified unequivocally that he requested a breath test instead of a blood test due to his fear of needles. (7/27/99 tr. pp. 6, 11.) The arresting officer was equivocal on this issue (5/20/00 tr. p. 53; 8/9/99 tr. p. 22). A second officer present during some of the events could not specifically recall if the defendant made such a request. (*Id.* p. 69.) The Court finds the defendant asked to take a breath test based on fear of needles. A blood test was, nontheless, taken pursuant to the officer's policy and stated intent to take it by force if necessary.

The rationale of the Ninth Circuit Court of Appeals in *Nelson v. City of Irvine*, 143 F.3d 1196 (1998) is persuasive. The State's attempt to distinguish the case on the basis of state law choice among chemical tests is not.

Consent, whether implied or express, is an exception to the rule against warrantless seizures. This defendant impliedly consented to the chemical testing of his blood by driving. He withdrew that consent and will suffer the consequences of his refusal if it is proved. The State then sought to employ another exception to the rule against warrantless seizures: exigency. The seizure was outside the provisions of § 343.305, Wis. Stats. Therefore, the State's argument that the law enforcement officer's statutory test option applies is inaccurate.

The State also argues that a blood test is more timely available and, therefore, more appropriate under exigent circumstances (Brief, p. 11). However, had the defendant's request for a different test been honored when made at Countryside Home, the breath test would be at least as timely

as the blood test at Fort Atkinson Memorial Hospital. Further, there is no evidentiary support of the State's position that triers of fact accept blood test results more readily than breath or urine analyses.

The *Nelson* court impliedly ruled in accord with the Wisconsin Supreme Court in *State v. Bohling*, 173 Wis. 2d 529, 494 N.W.2d 399 (1993), holding that forcible blood draws were available under the exigent circumstance exception to the Fourth Amendment. However, the *Nelson* court held that where, as here, an equally valid test is available with the defendant's consent, the exigent circumstance exception became unavailable. *Schmerber v. California*, 384 U.S. 757, 86 s. Ct. 1826, 16 L.Ed. 2d 908 (1966), requires that the seizure be by a reasonable method. When consent to a less intrusive seizure meets a coerced or forcible seizure, the latter method is unreasonable.

The attorneys advised this Court during argument that appeals would be forthcoming regardless of the nature of the decisions on these motions. A scheduling conference will be heard Friday, November 5, 1999, at 1:00 p.m., before the Hon. J.R. Erwin, Circuit Court Br. 3, 320 S. Main Street, Rm. 130, Jefferson County, Wisconsin, to determine whether or not this matter should be scheduled for trial at this time.

Dated this 26th day of October, 1999.

BY THE COURT:

/S/
J.R. Erwin
Circuit Court Branch 3

JRE:slm

pc: Michael Schaefer
Christopher Mutschler
Jay Krajewski

STATE OF WIS. CIRCUIT COURT JEFFERSON CO.

STATE OF WISCONSIN,
Plaintiff,

-vs-

ORDER
Case No. 99 CF 158

JAY D. KRAJEWSKI,
Defendant

For the reasons stated in the written decision of the Jefferson County Circuit Court, Branch 3, the Honorable J.R. Erwin, presiding, filed with the Clerk of the Circuit Court for Jefferson County on October 27, 1999 in the above captioned case, the Court Orders that the defendant's "Motion to Suppress Evidence based upon Unconstitutionally Coerced Blood Withdrawal" is granted and, therefore, the blood test result obtained from the defendant in this case shall not be admitted at trial.

Dated this 8th day of December, 1999, at Jefferson, Wisconsin.

/S/
Honorable J.R. Erwin
Circuit Court, Branch 3

Approved as to form only this
8th day of December, 1999.

/S/
Attorney Christopher A. Mutschler
Attorney for Defendant